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Romer v. Evans: Judicial Judgment or Emotive Utterance?

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ROMER v. EVANS: JUDICIAL JUDGMENT OR EMOTIVE UTTERANCE?

On May 20, 1996, the United States Supreme Court defeated the will of the people of Colorado to amend the state's constitution.\(^1\) Colorado voters passed "Amendment 2" on November 3, 1992, by a vote of 813,966 to 710,151,\(^2\) effectively prohibiting Colorado legislatures, agencies, and departments, at the local and state levels, from enacting and enforcing laws and policies that would protect homosexual orientation and conduct of its citizens.\(^3\) In its analysis, the Court found that there were no legitimate state interests for Amendment 2 and accused the people of Colorado of possessing a "bare desire" to harm a "politically unpopular group."\(^4\) At first glance, the Court's ruling was a victory for the gay rights lobby. However, lessons from the litigation and implications of the Court's opinion may prove serendipitous for future Amendment 2-type initiatives.\(^5\)

This Comment analyzes the judicial review of Amendment 2 and predicts the future of similar initiatives. Part One provides background and reasons for the Colorado initiative. Part Two reviews the Romer v. Evans decision of the United States Supreme Court. Part Three provides reasons why the Court misinterpreted Amendment 2. Finally, this comment explores lessons from the

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\(^2\) See Evans v. Romer, 882 P.2d 1335, 1338 (Colo. 1994) (reporting voting results of 53.4% in favor of amendment).

\(^3\) See COLO. CONST. art. II, § 2 (adopted Nov. 3, 1992). Amendment 2 provided:

> Neither the State of Colorado, through any of its branches or departments, nor any of its agencies, political subdivisions, municipalities or school districts, shall enact, adopt or enforce any statute, regulation, ordinance or policy whereby homosexual, lesbian or bisexual orientation, conduct, practices or relationships shall constitute or otherwise be the basis of or entitle any person or class of persons to have or claim any minority status quota preferences, protected status or claim of discrimination. This Section of the Constitution shall be in all respects self-executing.

\(^4\) Romer, 116 S. Ct. at 1628 (discussing fact that laws such as Amendment 2 raise inevitable inference of animosity toward protected class) (quoting Department of Agric. v. Moreno, 413 U.S. 528, 534 (1973)).

\(^5\) See, e.g., FIGHT THE RIGHT PROJECT, NATIONAL GAY AND LESBIAN TASK FORCE POLICY INSTITUTE, ANTI GAY INITIATIVES UNDER CONSIDERATION 1 (1993). During the litigation of Amendment 2, citizen organizations in at least eight other states began to promote similar amendments: Arizona, California, Florida, Idaho, Michigan, Ohio, Oregon, and Washington. Id.
litigation, together with precedent established and suggests the decision will prove beneficial for future Amendment 2-type initiatives.

I. ORIGIN OF AMENDMENT 2

Over the years, the gay rights lobby has become a powerful and formidable political force. In 1975, gay rights activists sought to pass a national gay rights bill, which lobbyists introduced repeatedly in Congress. Though Congress has been unwilling to extend protected class status to gays and lesbians, at least eight states have legislation that protects homosexuality. Since 1972, several cities and counties have incorporated "sexual orientation" into their civil rights statutes and ordinances, and at least 139 jurisdictions have adopted some kind of protection for homosexuality.

In recent years, the gay rights movement made significant advancements in the state of Colorado. The cities of Denver, Boulder, and Aspen promoted protection of homosexuality over free-

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6 Cf., e.g., Evans v. Romer, No. 92 CV 7223, 1993 WL 518586, at *12 (Colo. Dist. Ct. Dec. 14, 1993). "What was established to the satisfaction of this court is that gays and bisexuals though small in number are skilled at building coalitions which is a key to political power." Id.


8 See Romer, 116 S. Ct. at 1637 (Scalia, J., dissenting). Justice Scalia cited various congressional acts specifically excluding homosexuality from the protection of federal civil rights law. Id.; see also 140 CONG. REC. H2020-01, H2021 (1994). In March of 1994, during proceedings of the 103d Congress, Congressman Hancock discussed the infusion of the gay rights movement into society:


10 See id. at 1908 (stating that different jurisdictions offer variety of protections).
dom of association. Several ordinances required private landlords and employers to accommodate self-avowed homosexuals, irrespective of individual convictions. Additionally, several Colorado educational institutions had policies which protected persons from discrimination based upon "sexual orientation." Denver's Mayor Wellington Webb employed a "gay and lesbian advisory committee to monitor the interests of the same-sex community statewide." In 1990, the governor of Colorado issued an Executive Order which prohibited "discrimination in any form" for "sexual orientation" in state hiring and promotion. Finally, the Colorado Civil Rights Commission proposed that the General Assembly add "sexual orientation" to the list of state law civil rights.

Due to the rise of the gay rights movement, Coloradans sought "to preserve traditional sexual mores against the efforts of a politically powerful minority to revise those mores through use of the

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14 See Bransford, supra note 12, at 85 (discussing various movements in Colorado to ensure equal treatment of its citizens, despite sexual orientation).
16 See Respondent's Brief, supra note 13, at 6-7. H.B. 1059, given the benign title, "The Ethnic Harassment Bill," would have added "sexual orientation" to the list of Colorado's civil rights classes, which include race, color, ancestry, religion, and national origin. Id. Under the proposed law, harassment of homosexuals motivated by "bigotry," "bias," or evidence of "prejudice" could have constituted a class 6 felony. Id.; Bransford, supra note 12, at 9-23. Numerous individuals, including two homemakers, initiated efforts to defeat H.B. 1059. Id.
17 See, e.g., Romer, 116 S. Ct. at 1634 (Scalia, J., dissenting) (citing Andrew M. Jacobs, The Rhetorical Construction of Rights: The Case of the Gay Rights Movement, 1969-1991, 72 Neb. L. Rev. 723, 724 (1993)). "[Homosexuals] possess political power much greater than their numbers [suggest], both locally and statewide. Quite understandably, they devote this political power to achieving not merely a grudging social toleration, but full social acceptance." Id.
laws."

In 1991, a small grass roots effort to counter the advances of the homosexual lobby emerged, challenging gay rights laws at local and state levels. Organizers in Colorado Springs incorporated Colorado for Family Values (CFV), who drafted an initiative for a state constitutional amendment. The rationale behind the proposed amendment was a "conviction that . . . civil rights laws were not intended to give protected status to sexual orientation." and CFV's goal was to gather the necessary 49,279 signatures to put the initiative on the November 1992 General Election Ballot as a proposed constitutional amendment.

The news media immediately challenged CFV's motives, suggesting that supporters of the amendment discriminated "against innocent gays." The media did not frame its coverage to adequately reflect how providing protected class status would impact the citizens of Colorado and the nation. Despite opposition from

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18 Romer, 116 S. Ct. at 1629 (describing what Justice Scalia called "Kulturkampf").
19 See, e.g., BRANSFORD, supra note 12, at 9-35. The efforts to defeat H.B. 1059 and a proposed gay rights ordinance in Colorado Springs began with only a handful of concerned citizens posed against pro homosexual politicians and media coverage. Id.
20 See BRANSFORD, supra note 12, at 41. Colorado Attorney General, Gale Norton, said of the amendment: "Properly analyzed, the guiding intent behind Amendment 2 was not to deprive homosexuals . . . of any constitutionally guaranteed rights, but to remove any state-based grounds for putting such individuals in a more favorable position vis-a-vis other citizens than would be required under federal law." Id. at 101. During the process of selecting the phraseology for the proposed amendment, the CFV committee fell into two camps. Id. The first wanted the proposed amendment to reflect a moral and religious disapproval of homosexuality. Id. The second wanted the amendment to be drafted and defended solely on a civil rights basis, as reflected in the above quotations by CFV, the Attorney General, and the amendment itself. Id. CFV ultimately decided to go with the second approach, believing that voters would not sympathize with the wealthy gay rights lobby's drive to equate homosexuality with racial and minority civil rights status. Id. The principal argument in promotion of the initiative was the protection of freedom of speech and association over protected class status of homosexuality. Id. at 39-40.
21 See id. at 36-41. Some CFV members strongly influenced the defeat of the pro homosexual Ethnic Harassment Bill and had experienced the news media's attempts at casting negative connotations by labeling opponents as the "religious right." Id. "A position against gay rights automatically receives the religious right tag in the press." Id. at 229. Though the proposed amendment was written solely in civil rights language, the media, nevertheless, applied religious labels to supporters (even though some supporters did not disapprove of private rights for homosexuality) and ironically, the "more the news media turned up the heat, the more the demand grew for Amendment 2 petitions." Id. at 57.
23 BRANSFORD, supra note 12, at 41. The media "ignor[ed] the fact that gay rights laws in Denver, Boulder, and Aspen had aggressed against freedoms of association, speech, and moral expression for the heterosexual population." Id. at 93-94.
a powerful lobby and the media, the voters of Colorado passed Amendment 2.

II. ROMER v. EVANS: THE DISPUTE BEHIND THE DECISION

A. Adjudication in the Colorado Courts

On November 12, 1992, Richard G. Evans and eight other individuals filed suit in Colorado District Court in Denver to enjoin the enforcement of Amendment 2. Plaintiffs claimed that the amendment deprived them of their "First Amendment right of free expression and their Fourteenth Amendment right to equal protection of the laws." The trial court reviewed the amendment as if it involved a "fundamental right" to be free from "private bi-

24 See generally id. at 88-95. [When it served the homosexual agenda to refer to themselves as "gay" rather than homosexual, the [media complied]. When it served their agenda to use the term "sexual preference," they got it. When sexual preference backfired, sounding as if they had chosen the behavior, the pliable news rooms switched to "sexual orientation," sounding like something that can't be helped. Id. at 89; see also Mark Hartwig, A Content Analysis of Amendment 2 Coverage; Summary of Results, CITIZEN MAGAZINE, July 1993, at 4. A post-election survey by Citizen Magazine of 571 Colorado newspaper articles revealed that Quotes supporting the amendment were printed only half as often as quotes against it. Supporters making statements in favor of the amendment were outnumbered by those against, six-to-one. Not one religious authority was cited supporting Amendment 2 in the 571 articles. Nine religious authorities were cited opposing it. Forty-eight government authorities were cited opposing Amendment 2, including the governor, most mayors, city council members, and civil rights bureaucrats; only eleven government officials were quoted as having anything positive to say about the amendment . . . and these were not all sterling endorsements. Id. (citations omitted).


Section 1 of Article II of the Bill of Rights sets out that all political power in Colorado is vested in and derived from the people. Section 2 says the people of this state have the sole and exclusive right of governing themselves as a free sovereign and independent state. And to alter and abolish their Constitution and form of government whenever they may deem it necessary to their safety and happiness. Id.; see also BRANSFORD, supra note 12, at 161. After the votes were tallied, 7,000 gay rights supporters gathered at the state capitol. Id. Among the supporters were Governor Roy Romer and the mayor of Denver. Id. "Romer hinted that the amendment might be found unconstitutional. Mayor Webb told the crowd that he thought the amendment was invalid in the city of Denver. The homosexual lobby applauded these elected heroes, and gay leaders vowed a lawsuit and a boycott on the spot." Id.

26 See Respondents' Brief, supra note 13, at 1. The Boulder Valley School District, the City and County of Denver, the City of Boulder, the City of Aspen, and the City Council of Aspen were also included as plaintiffs. Id.

The court concluded that Amendment 2 caused immediate and irreparable harm to homosexuals and issued a preliminary injunction. The Defendants, Governor Roy Romer, Attorney General Gale A. Norton, and the State of Colorado appealed.

The Colorado Supreme Court, ignoring the lower court’s identification of a fundamental right, instead, created one of its own. The court held that the amendment effectively “fence[d] out” an “independently identifiable group” from the political process. Therefore, the court concluded that the amendment, with “reasonable probability,” infringed on a “fundamental right” to “participate equally in the political process,” violating the Equal Protection Clause. The court remanded the case for a trial on the merits employing a strict scrutiny standard of review.

See Evans v. Romer, No. 92-CV-7223, 1993 WL 19678, at *11-12 (discussing alleged fundamental right not to have private biases endorsed and addressing whether identifiable class exists).

See id. at *12 (granting preliminary injunction, preventing enforcement of Amendment 2).

See Romer v. Evans, 116 S. Ct. 1620, 1624 (1996). Although Governor Roy Romer was named as a defendant in his gubernatorial capacity, he is on record as having opposed Amendment 2. Id.

See id. (reviewing issue of fundamental right).

See Evans v. Romer, 854 P.2d 1270, 1281-82 (Colo. 1993) (discussing whether there was infringement of fundamental right).

See id. at 1282-86. Such a “fundamental right” had never been identified by the United States Supreme Court. Id. The Colorado Supreme Court presumed its new fundamental right from the value that the United States Supreme Court “placed on the ability of individuals to participate in the political process.” Id. at 1276 (emphasis added). Within the spectrum of political participation, the Colorado Supreme Court extrapolated from the United States Supreme Court’s reapportionment, minority party rights and voting rights cases, as well as “cases involving attempts to limit the ability of certain minority groups to have desired legislation implemented through the normal political process.” Id.

In his dissent, Judge Erickson noted that two new fundamental rights had been erroneously created by the Colorado courts. Id. at 1286 (Erickson, J., dissenting) (quotations omitted). The first was based on an alleged fundamental right “not to have the State endorse and give effect to private biases that affect an identifiable class.” Id. That supposed right “has never been identified or recognized by the United States Supreme Court or by any other court.” Id. at 1287. The second was an alleged fundamental right to “participate equally in the political process.” Id. The dissent pointed out that “at no point has the Supreme Court explicitly identified the fundamental right that the majority extrapolates from [the Court’s voting rights and ballot access cases] on which it relies.” Id. at 1294. Moreover, it was urged that:

we need not analyze the assertion of the appellees that a preliminary injunction could have been properly issued based on a fundamental right to participate equally in the political process . . . Neither the majority nor the appellees cite to any case where an appellate court has upheld a preliminary injunction based on different legal grounds than those articulated and relied on by the trial court.

See Evans, 854 P.2d at 1275. Although the Colorado courts created new fundamental rights, they refused to classify homosexuality as a quasi-suspect or suspect class. Id.
The trial court found that the state had "shown a compelling interest for Amendment 2 to impinge fundamentally on the right of homosexuals to participate equally in the political process." It found two compelling interests: the promotion of religious freedom and the promotion of family privacy. The court, however, granted a permanent injunction because Amendment 2 was not "narrowly drawn to achieve the promotion of religious freedom in the least restrictive manner possible." On appeal, the Colorado Supreme Court did not find that the State's asserted interests were compelling. The court, however, did recognize a substantial interest in protecting public morality. Thus, the court affirmed the permanent injunction and barred the enforcement of Amendment 2.

B. The Majority: Amendment 2 Defies Conventional Inquiry

Upon granting certiorari, the issue before the United States Supreme Court was whether interpretation of Amendment 2, under the "authoritative construction" of Colorado's Supreme

35 BRANSFORD, supra note 12, at 203 (analyzing issue of whether fundamental right exists).

36 Evans, 1993 WL 518586, at *9. The court found that the evidence presented was sufficient for only two of the argued compelling interests. Id.

37 Id. At trial, Pastor Hasford Van of Boulder's Second Baptist Church testified about possible implications of Boulder's "sexual orientation" ordinance involving employment of homosexuals, in view of the fact that there is no religious exception under Boulder's ordinance (the Aspen and Denver ordinances have exceptions for religious belief). Id. The court held that Amendment 2 was not narrowly drawn to protect religious freedom: "The narrowly focused way of addressing the Boulder ordinance is to add to it a religious exemption such as is found in the Denver and Aspen ordinances." Id. But see Bob Jones Univ. v. United States 461 U.S. 574, 574 (1983). A private school had a policy based upon religious belief, which prohibited interracial dating among students. Id. The Court found that the government had an overriding interest in eradicating racial discrimination in education, and therefore, despite the University's fundamental right to religious freedom, its tax-exempt status was revoked. Id. at 603-604.

38 See Evans v. Romer, 882 P.2d 1335, 1339-50 (Colo. 1993). The court considered the following interests asserted at trial:

(1) deterring factionalism; (2) preserving the integrity of the state's political functions; (3) preserving the ability of the state to remedy discrimination against suspect classes; (4) preventing the government from interfering with personal, familial, and religious privacy; (5) preventing government from subsidizing the political objectives of a special interest group; and (6) promoting the physical and psychological well being of Colorado children.

Id. at 1339. The state asserted an interest in "allowing the people themselves to establish public social and moral norms." Id. at 1346.

39 See id. at 1347 (stating substantial interest is insufficient to impinge upon fundamental rights).

40 See id. at 1350 (affirming lower court's decision enforcing injunction).

Court,42 violated the Equal Protection Clause of the Fourteenth Amendment.43 The Court stated that equal protection of the laws must coexist with "the practical necessity" that legislative classification often disadvantages other groups or persons.44 The disparity may be reconciled by a judicial determination that the law burdens a fundamental right, or targets a suspect class.45 The Court will uphold the law absent such a finding, "so long as it bears a rational relationship to a legitimate end."46 The Court found that Amendment 2 did not burden a fundamental right or target a suspect class.47 Nevertheless, the Court found that the law did not satisfy a "rational basis" standard of review.48

The Court did not entertain either the question of suspect class status of homosexuality or the state court's newly created "fundamental right" to participate equally in the political process and consequently only one legitimate state interest was necessary to uphold the amendment.49 The State asserted interests in protecting its citizens' freedom of association and, more specifically, the liberties of landlords and employers with objections to homosexuality.50 The defendants also cited an interest in conserving limited

42 See Romer, 116 S. Ct. 1620, 1624 (1996) (stating Court was not relying on its own interpretation of amendment "but upon the authoritative construction of Colorado's Supreme Court").

43 See U.S. Const. amend. XIV (providing equal protection of laws to all citizens).


45 See Romer, 116 S. Ct. at 1627 (explaining concept of rational basis scrutiny under Fourteenth Amendment).

46 Id. (citing Heller v. Doe, 509 U.S. 312 (1993) (discussing equal protection under United States Constitution)).

47 See Romer, 116 S. Ct. at 1620-29. The Court found that Amendment 2 did not burden a fundamental right. Id. With respect to the Colorado Supreme Court's new fundamental right, the United States Supreme Court wasted no ink on the theory; it merely recounted the lower court's creation of the alleged right, and then stated, "[w]e . . . affirm the judgment, but on a rationale different from that adopted by the State Supreme Court." Id. But see Evans v. Romers, 854 P.2d 1270, 1275 (Colo. 1993). The Colorado Supreme Court had acknowledged that homosexuality does not constitute suspect classification status. Id.

48 See Romer, 116 S. Ct. at 1627 (finding Amendment 2 "fails, indeed defies" rational basis review).

49 See id. at 1624 (analyzing objectives of Amendment 2).

50 See Evans v. Romer, 882 P.2d 1335, 1342 (Colo. 1994) (discussing state interest in "protecting the sanctity of religious, familial, and personal privacy"); see also Romer, 116 S. Ct. at 1629 (acknowledging state rationale for Amendment 2).
resources to fight discrimination. The Court found that the scope of the Amendment was too broad to address the state’s interests.

The Supreme Court stated that it relied on the “authoritative construction” of the Colorado Supreme Court in interpreting Amendment 2. The Court, however, failed to recognize as legitimate the interest in protecting morality that the state court had identified as substantial. The United States Supreme Court found that the state court’s construction ultimately prohibited any governmental entity from adopting similar, or more protective, sexual orientation legislation, absent an amendment to the state constitution.

The Court found that Amendment 2 prevented homosexuals from seeking specific legal protection for discrimination and that it forbid reinstatement of such laws. Moreover, “[h]omosexuals are forbidden the safeguards that others enjoy or may seek without constraint. They can obtain specific protection against discrimination only by enlisting the citizenry of Colorado to amend the state constitution.” Homosexuals may not even seek protection from general laws under Amendment 2. Finally, the Court stated that Amendment 2 would void all existing anti-discrimination ordinances available to homosexuals.

The Court did not address the issue of freedom of association, as Amendment 2 nullified legal protection for homosexuals “in pri-

51 See Romer, 116 S. Ct. at 1629 (stating Amendment 2 violates Equal Protection Clause by creating “classification of persons undertaken for its own sake”).
52 See id. at 1620 (failing to comment on substantive state interest for protecting order and morality). But see Evans v. Romer, 882 P.2d 1335, 1347 (asserting substantial state interests in protecting order and morality).
53 See Romer, 116 S. Ct. at 1624 (relying on interpretation of Colorado Supreme Court in reviewing Amendment 2).
54 See id. at 1624. The Court’s independent interpretation of Amendment 2 itself prevented a substantive analysis of the state’s asserted interests, which precluded even recognition of a legitimate interest. Id. at 1629.
55 See id. at 1625 (rejecting Amendment 2 as too “sweeping and comprehensive”) (quoting Evans v. Romer, 854 P.2d 1270, 1284-85 (Colo. 1993)). But see id. at 1630 (Scalia, J., dissenting) (noting that under Colorado Supreme Court’s construction of amendment, only burden to homosexuals is in promoting referendum to repeal Amendment 2).
56 See id. at 1625 (rejecting Amendment 2).
57 See id. at 1627 (finding only recourse is amendment of state constitution or trying to pass helpful laws of general applicability).
58 See id. at 1626 (finding Amendment 2 prevents use of general laws).
59 See id. at 1626. (citing COLO. REV. STAT. § 24-4-106(7) (1988)). The Court stated that “it was a fair, if not necessary, inference from the broad language of the amendment that it deprives gays and lesbians even of the protection of general laws and policies that prohibit arbitrary discrimination.” Id.
vate education and employment." At oral arguments, however, Chief Justice Rehnquist illustrated the conflict between freedom of association and protected class status of homosexuality, noting "a private homeowner who wants to rent a room . . . can decide to take only Irishmen if [he] wants, but [he] cannot discriminate on the basis of homosexuality." Nevertheless, any potential conflict between freedom of association and protected class status of homosexuality became moot when the Court accepted that the Denver, Boulder, and Aspen sexual orientation ordinances were generally applicable laws, protecting everyone. Amendment 2, therefore, unfairly discriminated against homosexuals in the private realm by denying them protection afforded to all other residents. The Court's interpretation of Amendment 2 mandated one conclusion: "laws of the kind now before us raise the inevitable inference that the disadvantage imposed is born of animosity toward the class of persons affected." The Court held that the amendment was motivated by nothing but "animus" and a "bare desire to harm [a] politically unpopular group." Thus, Amendment 2 violated the Equal Protection Clause of the Fourteenth Amendment.

It is submitted that the Court's independent interpretation of Amendment 2 curtailed a conventional Fourteenth Amendment

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60 Id. at 1629. The Court noted that the "primary rationale" for Amendment 2 was to restore freedom of association for Colorado's citizens. Id.
62 See Romer, 116 S. Ct. at 1628. The Court's reasoning allowed it to reject the State's argument that Amendment 2 "puts gays and lesbians in the same position as all other persons. [T]he measure does no more than deny homosexuals special rights." Id. Rather than finding that the amendment prevented favored status of homosexuality, the Court found that homosexuals were singled out for "disfavored legal status," and "hardships." Id.
63 Id. (analyzing whether there is legitimate purpose to Amendment 2).
64 Id. at 1627, 1628 (citing Department of Agric. v. Moreno, 413 U.S. 528, 534 (1973)).
65 Id. Relying on another case involving a Fifth Amendment analysis, the Court found the motives of the Colorado voters suspect: "If the adverse impact on the disfavored class is an apparent aim of the legislature, its impartiality would be suspect." Id. at 1627-28 (quoting United States Railroad Retirement Bd. v. Fritz, 449 U.S. 166, 181 (1980) (Stevens, J., concurring)). Under the Court's reasoning, any disadvantages or burdens to homosexuals under Amendment 2 would not reflect merely the "incidental" results which accompany all legislation, but the very purpose and aim of the voters to disadvantage and burden homosexuals. See id. at 1627-28 (citing Personnel Administrator of Mass. v. Feeney, 442 U.S. 256 (1979)). "Even laws enacted for broad and ambitious purposes often can be explained by reference to legitimate public policies which justify the incidental disadvantages they impose on certain persons." Id. at 1628. Nevertheless, when a law precludes a class of persons from the protection of laws designed to protect the public at large, as the Court concluded, the law itself prevents a traditional equal protection analysis and reveals a priori that the motives behind the law were improper. Id.
inquiry. While the Court found that the scope of Amendment 2 revealed improper motives of the Colorado voters, the Court overlooked a relevant and critical inquiry. The Court failed to determine whether the state could disapprove of and discourage homosexuality by denying protected class status to homosexuals.\(^6\)

C. The Dissent: Amendment 2 Merely Denies Homosexuality Protected Class Status

Proper reliance on the state court's interpretation of Amendment 2 may have led the Supreme Court to find a legitimate state interest.\(^6\) The Court, however, crafted a new constitutional doctrine, long on "emotive utterance" and short on "legal citation."\(^6\) As the dissent noted, the majority ignored an issue relevant to Amendment 2's constitutionality.\(^6\) The dissent argued that the majority wrongly attacked the Coloradans' motives, as Amendment 2 merely expressed disapproval of homosexuality by denying the class special protective status.\(^7\)

The dissent found that the amendment prohibited "special treatment of homosexuals, and nothing more."\(^7\) Amendment 2 did not preclude homosexuals from seeking protection from Colorado's anti-discrimination laws, as all residents are protected under general laws.\(^7\) The dissent cited the Colorado Supreme Court's construction of Amendment 2 that "Amendment 2 is not intended to have any effect on [existing anti-discrimination] legislation."\(^7\) Thus, homosexuals may seek special protection as mem-

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\(^6\) See Evans v. Romers, 882 P.2d 1335, 1347 (Colo. 1994) (stating substantial interest is insufficient to impinge upon fundamental rights).

\(^7\) See Romer, 116 S. Ct. at 1629 (relying upon Colorado Supreme Court's interpretation of Amendment 2).

\(^6\) See id. at 1630 (Scalia, J., dissenting) (rejecting majority's acceptance of state interest in protecting political process).

\(^6\) See id. at 1631 (finding state interest in political process not fundamental or relevant to discussion).

\(^7\) See id. at 1630, 1633 (equating type of "animus" at issue as similar to disapproval of criminal conduct or moral wrongs, such as polygamy); see also Stuart Taylor, Jr., Is Judicial Restraint Dead?, N.J.L.J., Aug. 26, 1996, at 51 (discussing Justice Scalia's assertion that Evans majority limited rights of Coloradans to self-government). See generally Kathleen M. Sullivan, Decisions Expand Equal Protection Rights, NAT'L L.J., July 29, 1996, at C7 (analyzing Justice Scalia's "caustic dissent").

\(^7\) See Romer, 116 S. Ct. at 1630 (Scalia, J., dissenting) (finding that statute properly prohibited special treatment for homosexuals); see also Sullivan, supra note 70, at C7 (discussing Scalia's dissent).

\(^7\) See Romer, 116 S. Ct. at 1630 (citing Evans v. Romer, 882 P.2d 1335, 1346 (Colo. 1994)) (noting that homosexuals may still seek protection under general laws).

\(^7\) Id. at 1630 (quoting Evans v. Romer, 882 P.2d 1335, 1346 (Colo. 1994)).
bers of classes such as senior citizens or racial minorities. The dissent stated that "[t]he only denial of equal treatment [the majority] contends homosexuals have suffered is this: [t]hey may not obtain preferential treatment without amending the state constitution." The majority's characterization of the amendment's effect was "electoral-procedural discrimination," a doctrine yet unknown to the Supreme Court. Showing that electoral-procedural discrimination is jurisprudentially unsound, Justice Scalia wrote:

"Consider a state law prohibiting the award of municipal contracts to relatives of mayors or city councilmen. Once such a law is passed, the group composed of such relatives must, in order to get the benefit of city contracts, persuade the state legislature—unlike all other citizens, who need only persuade the municipality. It is ridiculous to consider this a denial of equal protection, which is why the Court's theory is unheard-of."

Further, there is a rational basis for Amendment 2, validating the law at enactment. As the dissent reasoned, the majority over-
looked Amendment 2’s purpose and, consequently, its rational basis. Justice Scalia noted that the majority failed to even mention *Bowers v. Hardwick,* a case most relevant to the issue before the Court. The *Bowers* Court affirmed the constitutionality of state laws that criminalize homosexual conduct. Thus, “it is constitutionally permissible for a State to enact other laws merely disfavoring homosexual conduct.” Moreover, the dissent explained, “[i]f it is rational to criminalize the conduct, surely it is rational to deny special favor and protection to those with a self-avowed tendency or desire to engage in the conduct.”

In addition, the majority “labor[ed] mightily” to circumvent *Davis v. Beason.* In *Beason,* the Court upheld the constitutionality of an Idaho statute that denied polygamists the right to vote and hold office. The *Romer* Court found that any reliance upon *Beason* as authority for upholding Amendment 2 was misplaced. “To the extent [Beason] held that the groups designated in the statute may be deprived of the right to vote because of their status, its ruling could not stand without surviving strict scrutiny, a most doubtful outcome.” The dissent noted, however, that the majority failed to mention that *Beason* did not involve an invidious statute; the *Beason* Court used strict scrutiny “because [the Court] [had] declared the right to vote to be a ‘fundamental polit-

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78 478 U.S. at 186-96 (holding Georgia’s sodomy statute did not violate fundamental rights of homosexuals).
80 *See Bowers,* 478 U.S. at 186-96 (holding Georgia’s sodomy statute constitutional).
81 *Romer,* 116 S. Ct. at 1631 (Scalia, J., dissenting). “[The Bowers] holding is unassailable, except by those who think that the Constitution changes to suit current fashions.” *Id.*
82 *Id.* at 1632 (noting it is irrational to protect persons with tendency to engage in wrongful conduct).
83 *Id.* at 1636 n.3 (criticizing distinction majority made between case at bar and *Beason*).
84 133 U.S. 333, 337 (1890) (finding bigamy and polygamy to be crimes that freedom of religion could not overcome).
85 *See Romer,* 116 S. Ct. at 1628 (Scalia, J., dissenting) (noting that polygamy can be criminalized and those guilty can be deprived of right to vote); *see also* id. at 1636 (citing Richardson v. Ramirez, 418 U.S. 24, 53, 94 (1974)) (distinguishing *Murphy v. Ramsey* and *Davis v. Beason* as two cases where court approved exclusion of bigamists and polygamists from franchise under territorial laws of Utah and Idaho).
86 *See id.* (holding reliance upon *Beason* was improper based on distinctions between that case and case at bar).
87 *Id.* (citing Dunn v. Blumstein, 405 U.S. 330, 337 (1972)) (asserting statute granting right to vote to some citizens, but denying franchise to others, does not further any compelling state interest and violates Equal Protection Clause of Fourteenth Amendment).
ical right.’” Both Idaho and Colorado asserted the prevention of social harm as rational bases for the enactment of their respective statutes.

The dissent concluded that the majority “employ[ed] a constitutional theory heretofore unknown to frustrate Colorado’s reasonable effort to preserve traditional American moral values.” The Court accomplished that end “not only by inventing a novel and extravagant constitutional doctrine to take the victory away from traditional forces, but even by verbally disparaging as bigotry adherence to traditional attitudes.” The dissent ultimately asserted that the Court took sides in the “culture war,” siding with the political correctness of the gay rights movement. Unable to discern a rational analysis from the majority’s opinion, the dissent concluded that the decision had “no foundation in American constitutional law, and is an act, not of judicial judgment, but of political will.”

III. MERE EMOTIVE UTTERANCE

A. Political and Media Influence on the Court’s Decision

In his dissenting opinion, Justice Scalia stated that “[t]he Court’s portrayal of Coloradans as a society fallen victim to pointless, hate-filled ‘gay-bashing’ was so false as to be comical.” The Court’s characterization of Amendment 2 reiterated the domineer-

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88 Id. at 1636 n.3 (Scalia, J., dissenting) (citations omitted) (finding fundamental right was not at issue in Romer). But see Akhil R. Amar, Attainder and Amendment 2: Romer’s Rightness, 95 Mich. L. Rev. 203, 227 (1996) (labeling use of Davis v. Beason, “another off-point case dredged up by the dissent”).

89 Romer, 116 S. Ct. at 1636 (Scalia, J., dissenting). The dissent stated: It remains to be explained how [the Idaho statute] was not an “impermissible targeting” of polygamists, but (the much more mild) Amendment 2 is an “impermissible targeting” of homosexuals. Has the Court concluded that the perceived social harm of polygamy is a “legitimate concern of the government,” and the perceived social harm of homosexuality is not?

Id.

90 Id. (arguing majority’s holding that case could not survive strict scrutiny was frustration of attempt to preserve American values).

91 Id. at 1637 (finding majority purposefully thwarted efforts and improperly rejected desire to preserve traditional concepts of morality).

92 See id. (Scalia, J., dissenting) (arguing majority was taking sides in political debate over gay rights); see also Sullivan, supra note 70, at C7 (discussing Justice Scalia’s dissent).

93 Romer, 116 S. Ct. at 1637 (Scalia, J., dissenting) (arguing that the majority has impermissibly taken sides in cultural debate); see also Bowers v. Hardwick, 478 U.S. 186, 194 (1986) (asserting that Court approaches illegitimacy when pronouncing judge-made constitutional law).

94 Romer, 116 S. Ct. at 1633 (Scalia, J., dissenting) (citations omitted) (noting that Colorado repealed anti-sodomy laws); see also Thomasson v. Perry, 80 F.3d 915, 931 (4th Cir.
ing views of the media and legal academia\(^9\) who portrayed the amendment as stripping homosexuals of their rights while depicting voter motives as hateful and bigoted.\(^9\) It is submitted that the emotive rhetoric of the gay rights movement influenced the judiciary in its characterization of Amendment 2, and is largely responsible for the Court’s interpretation of the law.\(^9\)

**B. Finding a Safe Harbor in Generally Applicable Laws**

The majority broadly interpreted the amendment and assumed that Amendment 2 precluded homosexuals from finding a safe harbor in general laws.\(^9\) The Court accurately found that Amendment 2 repealed and rescinded Colorado’s gay rights related provisions.\(^9\) The Court’s finding, however, that the law prohibited all legislative, executive or judicial action in state or local governments to protect the class of homosexual persons was inaccurate.\(^1\)

Amendment 2 provides that:

1996) (holding that government actions against homosexual service members are not illegitimate because they presume gays commit criminal misconduct).


\(^9\) See *Bransford*, supra note 12, at 88-95. The gay rights hate rhetoric of the media and legal academia, which sound judicial judgment once deflected, has now reduced constitutional jurisprudence to “terminal silliness.” Id. After voter passage of Amendment 2, gay rights advocates labeled Colorado the “state of hate,” and Colorado became the target of a national boycott. Id. at 170-83.

\(^9\) By drafting and defending the amendment on a civil rights basis, CFV and the state had to assume that freedom of association would prevail over protection of homosexuality. *Id.* *But see Romer*, 116 S. Ct. at 1628 (Scalia, J., dissenting). The *Romer* majority gave no credence to CFV’s assertion of the countervailing right to freedom of association. *Id.* The Court held that the broad denial of equal protection rights of homosexuals is:

so far removed from particular justifications that we find it impossible to credit them. We cannot say that Amendment 2 is directed to any identifiable legitimate purpose or discreet objective. It is a status-based enactment divorced from any factual context from which we could discern a relationship to legitimate state interest.

*Id.*

\(^9\) See *Romer*, 116 S. Ct. at 1626 (declaring explicit withdrawal of homosexuals from protected status may remove their immunity under general laws which prohibit arbitrary and capricious discrimination). *But see id.* at 1630 (Scalia, J., dissenting) (arguing singular removal of one class of persons from Equal Protection Clause does not itself violate equal protection).

\(^9\) See *Romer*, 116 S. Ct. at 1626; see also *Evans v. Romer*, 854 P.2d 1270, 1284 (Colo. 1993). Colorado Executive Order D0035 (1990) which forbids employment discrimination based on sexual orientation by the state would be rescinded if Amendment 2 were valid. *Id.* Several provisions prohibiting discrimination based on sexual orientation at Colorado state colleges would also be rescinded. *Id.*

\(^1\) See *Romer*, 116 S. Ct. at 1626. The Court stated that Amendment 2 imposed special disability on homosexuals because it made them the only class of persons who could not seek protection by petitioning Colorado state or local legislatures to enact laws to protect
Neither the State of Colorado, through any of its branches or departments, nor any of its agencies, political subdivisions, municipalities or school districts, shall enact, adopt or enforce any statute, regulation, ordinance or policy whereby homosexual, lesbian or bisexual orientation, conduct, practices or relationships shall constitute or otherwise be the basis of or entitle any person or class of persons to have or claim any minority status, quota preferences, protected status or claim of discrimination. This Section of the Constitution shall be in all respects self-executing.\(^1\)

The first clause of the provision provides a standard to limit civil rights classes.\(^2\) The second clause revokes all remedies based upon classifications in the first clause.\(^3\) Reading the second clause separately from the first clause, the Court would have been correct in finding that homosexuals would have no claim of discrimination, even under generally applicable laws. Read in its entirety, however, the amendment only precluded remedies where homosexuality was the basis for a protective statute, regulation, ordinance, or policy.\(^4\) As Justice Scalia noted in his dissent, homosexuals obtain the same benefits that all persons have under general laws, including favored status as the laws so delineate.\(^5\) Thus, Amendment 2 did not protect homosexual orientation or homosexuality.\(^6\)

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\(^1\) See Romer, 116 S. Ct. at 1633-34 (Scalia, J., dissenting). Justice Scalia suggested that moral and social disapproval of homosexuality warrants abridgment of protected class status of homosexuality. Id. The Court distinguished laws designed to protect homosexuals from laws designed to protect the general public. Id. at 1632. For example, the Court noted that several government employees feared immediate discrimination if the state were not enjoined from enforcing Amendment 2, since other general laws were unable to prevent discrimination based on sexual orientation. Id.

\(^2\) See id. (prohibiting enactment, adoption or enforcement of statutes, regulations, ordinances or policies that give homosexual persons protected status based on sexual orientation).

\(^3\) See id. (revoking all special claims granted to homosexuals, lesbians or bisexuals).

\(^4\) See id. (prohibiting sexual orientation to be basis for special protection under Colorado laws).

\(^5\) See Romer, 116 S. Ct. at 1633 (Scalia, J., dissenting) (asserting Amendment 2 denies homosexuals special status).
conduct, but did not prevent protection under generally applicable laws.

At oral argument, Chief Justice Rehnquist explored whether homosexuals would be protected under general laws if the Court upheld Amendment 2. He asked:

The [amendment] says, no agency shall adopt or enforce any policy whereby homosexual conduct or . . . orientation, shall be the basis of any claim of discrimination. So if a police department says, there's been a lot of gay-bashing. It's our policy. Stop it. If the head librarian says, you're . . . not letting [gays] in. Stop it. If the health department says the same thing, if the insurance commissioner says the same thing, doesn't this word policy [prevent] that?

The petitioners' enigmatic and inconsistent response may have confused some members of the Court. For example, petitioners' counsel inaccurately stated that the police department could have such a policy, while the amendment would preclude a similar city policy. The more sound interpretation, however, is that no protective policy under Amendment 2 could be based on homosexuality. Application of general laws would have assuaged the Court's concern over a denial of equal protection of the laws to homosexuals. Even with Amendment 2, homosexuals would have the same access to the courts as others to assert violations of general laws; homosexuality just could not be the basis for awarding judgment.

C. The Court's Decision Defies Conventional Inquiries

The Court also stated that, "Amendment 2 . . . defies . . . conventional inquiry." Consequently, the Court's opinion did not in-

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106 See id. at 1633 (Scalia, J., dissenting). States may enact laws permitting discrimination in accordance with disapprobation of homosexuality, but the majority opinion improperly equated moral disapproval of homosexual conduct with racial and religious bigotry. Id.; see also Romer v. Evans, No. 94-1039, 1995 WL 605822, at *37 (U.S. Oral Arg. Oct. 10, 1995). Under the rule of prerogative, private individuals may discriminate for any reason, except for status protected under civil rights ordinances and policies, such as race, national origin and gender. Id. A private owner may deny someone because of the way he combs his hair. Id. Under jurisdictions with gay rights ordinances, however, a private owner may not deny someone because of his self-avowed homosexuality. Id.


108 Id. at *27. Questioning counsel, Justice Renquist was concerned about possible prohibition of all policies that might protect homosexuals from facing discrimination. Id.

109 See id. at *29 (responding to inquiries from Justice Rehnquist at oral argument).

110 Romer v. Evans, 116 S. Ct. 1620, 1627 (1996). The Court concluded that Amendment 2 defied conventional inquiry because it imposed such a broad and undifferentiated disable-
volve a conventional equal protection analysis, but rather abstract speculations on the breadth and effects of Amendment 2. The Court did not conclude, however, that Amendment 2 was void of state interests. Rather, the Court's broad interpretation of the amendment nullified all potentially legitimate state interests, allowing invalidation without ruling on any asserted interests. Thus, the Court never addressed the essential issue of whether the states may exclude homosexuality from protected status.

The dissent, though, expounded upon a substantial state interest in protecting order and morality, concluding that states may not only deny homosexuality protected class status, but disapprove of homosexuality to the point of criminalizing such conduct. Review of that asserted interest was founded upon the constitutional right of states to exercise their police power. The dissent in Romer and the Colorado Supreme Court addressed the morality interest, despite the fact that Amendment 2 was neither drafted nor principally defended on a police power basis. Both opinions concluded that Colorado's enactment of Amendment 2 was a valid exercise of police power.

D. Lessons to Be Learned from the Litigation

The first lesson for states considering Amendment 2-type initiatives involves potential misinterpretation of laws. In retrospect,
the Colorado legislature should have phrased the initiative to explicitly preclude an overly-broad interpretation. Future initiatives to deny protected class status of homosexuality should precisely state such an objective, while expressly clarifying that the measure will not deny any person the protections of general protective laws and remedies. Second, future laws should rely upon the state's police power in denying protected status of homosexuality. Only as a by-product of the states' police power may the dissent's argument stand: If it is constitutional to criminalize homosexuality, surely it is within the states' power to disfavor it. In light of the states' authority, confirmed in Bowers, a state that chooses not to criminalize homosexuality, does not relinquish its right to deny homosexual protected class status.

CONCLUSION

Influenced by the emotive rhetoric of the gay rights movement, the Court struck down Amendment 2, accusing the Colorado voters of acting with animus and a bare desire to harm homosexuals. Because the Court did not entertain the assertion that Amend-

116 See U.S. Const. amends. IX & X. Under these amendments, all powers that are not delegated to the federal government or prohibited by it to the states, are reserved for the states and the people. Id. Included within that reserved power is the states' general "police power," which is the states' power to protect the health, safety, morality and general welfare of its residents. Id.; see also Berman v. Parker, 348 U.S. 26, 32 (1954). "Public safety, public health, morality, peace and quiet, law and order—these are some of the more conspicuous examples of the traditional application of the police power." Id.; Steverson v. City of Vicksburg, 900 F. Supp. 1, 11 (S.D. Miss. 1994) (citing U.S. Const. amend. X and Harper v. Lindsay, 616 F.2d 849 (5th Cir. 1980)). "Municipalities have broad regulatory authority over public health, welfare, and morals by virtue of their police powers." Id.; Loper v. New York City Police Dept', 766 F. Supp. 1250, 1288 (S.D.N.Y. 1991) (quoting Berman v. Parker, 348 U.S. 26, 33 (1954)). The Supreme Court has found that local government's police power is broad and includes spiritual values. Id.; Evans, 882 P.2d at 1346 n.11. With respect to the State's failure to rely on its police power, there was some dispute about whether consideration of morality arguments were properly before Colorado's high court. Id. Plaintiffs point out that in contrast to the ... interests addressed by the trial court, morality was not listed in the state's disclosure certificate or the state's opening statement at trial as a separate interest supporting Amendment 2." Id. The State responded, stating, "the issue of public morality ... permeates the discussion of compelling interests and indeed, can be regarded as a compelling interest in its own right." Id. The Colorado Supreme Court ruled that the interest was properly before the court. Id. In its cursory consideration of public morality, the court that actively crafted a "fundamental right," would not concede that public morality was a compelling state interest. Id. at 1347. The court recognized that, "at the most," the interest was substantial. Id. The court also noted that the state only cited one authority in support of the morality interest. Id.

117 See Romer, 116 S. Ct. at 1632 (Scalia, J., dissenting) (suggesting that discrimination is permissible if disadvantaged class is defined by conduct which is constitutionally criminalized).

118 Bowers, 478 U.S. at 186-96 (holding Georgia's sodomy statute did not violate fundamental rights of homosexuals).
ment 2 burdened a fundamental right, only one legitimate state
interest was required to uphold the amendment. Nevertheless,
the Court disregarded the state court’s “authoritative construc-
tion” of the amendment and pronounced its own interpretation.
The Court’s overly-broad interpretation invalidated the amend-
ment and effectively foreclosed a substantive inquiry into the
state’s asserted interests.

The Court’s ruling essentially states that when a law targets an
identifiable class of persons for total preclusion from legal protec-
tion, the law is invalid. The analysis merely involved the implica-
tions of an overly-broad law. Interestingly, the legal questions
raised during litigation remain unchanged: Homosexual persons
were not added to the list of suspect classifications; Bowers v.
Hardwick remains good law, and; the passage of an initiative does
not burden a fundamental right to participate in the political
process.

Consequently, Amendment 2 would have passed constitutional
muster without the Court’s independent interpretation. That con-
clusion is based upon the Court’s subjecting the amendment only
to the rational basis standard of review.

Certainly, the Court’s ruling was an initial defeat for Colorado
voters. The precedent establishing the standard of review, how-
ever, should prove beneficial for future initiatives that are
thoughtfully and precisely framed under the states’ authority to
disapprove of homosexuality.

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